Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-70–08 OF 2018 (P)
AZAHAR MOHAMED, ALIZATUL KHAIR, ZAWAWI SALLEH, IDRUS HARUN AND NALLINI PATHMANATHAN FCJJ
21 OCTOBER 2019

Statutory Interpretation — Subordinate legislation — Validity — Local Government Act 1976 ('the LGA') provided that no employee could be dismissed or reduced in rank without being given reasonable opportunity of being heard — LGA allowed local authority to make rules ('regulations') for maintenance of good conduct and discipline among its employees — Regulation 25(2) allowed local authority to, inter alia, dismiss or reduce in rank employee who had a criminal charge proven against him without affording employee any show-cause notice or opportunity to be heard — Whether reg 25(2) void for being ultra vires the LGA — Whether power given to local authority to make rules could not be so enlarged as to abrogate fundamental rights/principles of natural justice preserved by the LGA parent Act — Whether LGA did not expressly or explicitly permit rule-making power of local authority to override provisions of the parent Act — Whether even doctrine of harmonious construction of statutes could not save reg 25(2) when read together with the LGA — Whether failure to give employee show-cause notice or opportunity to be heard denied him of procedural fairness accorded by arts 5(1) and 8(1) of the Federal Constitution

While employed as a security guard with the second appellant ('the Majlis'), the respondent ('Muziadi') was convicted and fined in the magistrate's court for an offence under the Minor Offences Act 1955. On learning about the conviction and fine four years later, the Majlis requested its disciplinary authority ('the first appellant') to study the matter and decide upon an appropriate punishment to be meted out to Muziadi under the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 ('the Regulations'). The Regulations were made by the Majlis pursuant to the power given to it by s 17(1) of the Local Government Act 1976 ('the LGA') to make rules for the maintenance of good conduct and discipline among its employees. The first appellant subsequently notified Muziadi that his employment was terminated 'in the public interest' pursuant to reg 50 of the Regulations which entitled him to a full pension and retirement benefits. Muziadi rejected the decision, pointing out that he was never given any show-cause letter or the grounds for his termination or a chance to be heard before the decision to terminate him was taken. The first appellant then reconsidered the matter and then notified Muziadi that his termination under reg 50 had been revoked and that he was

instead dismissed under reg 39(g) of the Regulations ('the decision'), which denied him of any pension or retirement benefits. The High Court allowed Muziadi's judicial review application, quashed the decision and ordered damages payable to Muziadi to be assessed by the registrar. The High Court held that there was procedural impropriety on the first appellant's part in not giving Muziadi a show-cause notice and an opportunity to be heard pursuant to s 16(4) of the LGA. The court held that the appellants could not rely upon reg 25(2) to summarily dismiss Muziadi because that provision was void for being inconsistent with the parent statute, ie, the LGA. Regulation 25(2)(a) allowed the Majlis to dismiss or reduce in rank an employee without giving him/her any show-cause notice or opportunity to be heard if the ground for dismissal or reduction in rank was on account of a criminal charge that had been proven against the employee. Similarly, reg 50(4) allowed an officer's service to be terminated 'in the public interest' without giving him any opportunity of being heard. The Court of Appeal ('COA') dismissed the appellants' appeal and affirmed the High Court's decision. The COA held, inter alia, that since the matter involved Muziadi's employment, and therefore his livelihood, he should have been given a show-cause notice and the right to be heard pursuant to both s 16(4) of the LGA and reg 29(1) of the Regulations. The appellants were granted leave to appeal to the Federal Court against the COA's decision, inter alia, on the question whether reg 25(2) was void for being ultra vires s 16(4) of the LGA.

Held, dismissing the appeal and affirming the decisions of the courts below:

(1) Regulation 25(2) of the Regulations was void for being ultra vires s 16(4) of the LGA. The submission that Muziadi should not be afforded the right to be heard merely by virtue of his criminal conviction was unsustainable (see para 85).

(2) The general rule-making power of the Majlis under s 17(1) of the LGA did not extend the scope of that power so as to abrogate or alter the effect of the fundamental rights contained in the second proviso to s 16(4) of the LGA. Fundamental rights might only be disregarded if clear and express words of the Legislature permitted such abrogation. Unless there was a clear authority in the parent Act for subsidiary legislation to override the statutory provision contained in the second proviso to s 16(4), reg 25(2) of the Regulations was invalid. The said second proviso was explicit and mandatory, unconditional and unqualified. Clear words were required before the section could be construed to be subject to the general rule-making power of the Majlis under s 17(1) of the LGA. There were no such clear words in s 16(4) (see paras 73–74).

(3) The second proviso to s 16(4) of the LGA incorporated the common law principle of natural justice, ie, the maxim audi alteram partem. Subsidiary or delegated legislation (reg 25) could not, or ought not to,

infringe the parent Act (which codified common law principles) save in exceptional circumstances where the empowering statute provided that power expressly. Even so, it might well be open to challenge, given that the instant case dealt with the right to be heard in relation to employment, which related to the right to livelihood (see para 61).

(4) A subsidiary power to make regulations 'for the purpose of maintaining good conduct and discipline among officers and employees' could not be so exercised as to bring into existence disabilities not contemplated by the provisions of the parent Act or to deny the common law rights which had been codified in the parent Act itself. Unless the parent Act contained express words to the contrary, it had to be assumed that the Act did not alter the codified common law principle. Where a statute was capable of two interpretations, one involving the alteration of the common law and the other not, the latter interpretation was to be preferred. It was also a well established principle of statutory interpretation that Parliament was presumed not to have intended to limit fundamental rights unless it indicated such intention in clear terms (see paras 75 & 84).

(5) Even if the doctrine of harmonious construction was applied to the factual matrix of the instant appeal, it was not possible to reconcile the differences in the contradictory provisions and to give effect to both of them. There was conflict or inconsistency between s 16(4) of the LGA and reg 25(2) of the Regulations. Subsidiary or delegated legislation must yield to the primacy of the parent Act and operate within the context of the parent Act and shall not be broader than the enabling legislation. This general principle of statutory interpretation was codified in s 23 of the Interpretation Acts 1948 and 1967 (see paras 80–82).

(6) Muziadi had been denied the procedural fairness mandated by arts 5(1) and 8(1) of the Federal Constitution. The termination was first done in accordance with reg 50; thereafter the first appellant changed its mind and dismissed Muziadi pursuant to reg 39(g). Muziadi was not informed of the reason for the aforementioned changes or given the opportunity to defend himself before the decision was taken to dismiss him. The act of converting the initial decision to terminate in the public interest, which in itself breached the audi alteram partem rule, was exacerbated by the subsequent decision to dismiss him. It amounted to a second and more serious breach of the said rule as Muziadi was deprived of his right of pension, etc. The appellants had acted unlawfully and against the rules of natural justice, not once, but twice (see paras 89, 91 & 93).

(7) Under the additional powers given to the High Court in para 1 of the Schedule to the Courts of Judicature Act 1964, the court, besides issuing certiorari, had power to make consequential orders for the purpose of assessing fair compensation/damages to the dismissed employee. In the instant case, the High Court was correct in ordering damages to be

assessed by the registrar and these damages had to be assessed on the basis that Muziadi remained in his position, as he was never dismissed. The effect of the court's decision in granting certiorari was that his position was maintained (see paras 106–107 & 109–110).

[Bahasa Malaysia summary

Semasa bekerja sebagai pengawal keselamatan dengan perayu kedua ('Majlis'), responden ('Muziadi') telah disabitkan dan didenda di mahkamah majistret untuk kesalahan di bawah Akta Kesalahan Kecil 1955. Apabila mengetahui tentang sabitan dan denda tersebut empat bertahun-tahun kemudian, Majlis meminta pihak berkuasa tatatertib ('perayu pertama') untuk mengkaji perkara itu dan memutuskan hukuman yang bersesuaian untuk dikenakan ke atas Muziadi di bawah Peraturan-Peraturan Pegawai Awam (Tingkah Laku dan Tatatertib) Wilayah Wellesley 1995 ('Peraturan tersebut'). Peraturan tersebut dibuat oleh Majlis menurut kuasa yang diberikan kepadanya oleh s 17(1) Akta Kerajaan Tempatan 1976 ('AKT') untuk membuat peraturan bagi penyelenggaraan kelakuan dan disiplin yang baik di kalangan pekerjanya. Perayu pertama kemudian memberitahu Muziadi bahawa pekerjaannya telah ditamatkan 'demi kepentingan awam' menurut peraturan 50 Peraturan tersebut yang memberi hak kepadanya untuk mendapat manfaat penuh pencen dan persaraan. Muziadi menolak keputusan itu, dengan mengutarakan bahawa dia tidak pernah diberi surat tunjuk sebab atau alasan untuk penamatannya atau peluang untuk didengar sebelum keputusan untuk menamatkannya telah diambil. Perayu pertama kemudian mempertimbangkan semula perkara itu dan kemudian memberitahu Muziadi bahawa penamatannya di bawah peraturan 50 telah dibatalkan dan dia sebaliknya telah dipecat di bawah peraturan 39(g) Peraturan tersebut ('keputusan'), yang menafikannya apa-apa pencen atau faedah persaraan. Mahkamah Tinggi membenarkan permohonan semakan kehakiman Muziadi, membatalkan keputusan itu dan memerintahkan ganti rugi yang perlu dibayar kepada Muziadi untuk ditaksir oleh pendaftar. Mahkamah Tinggi berpendapat bahawa terdapat ketidakpatuhan prosedur di pihak perayu pertama dengan tidak memberi notis tunjuk sebab kepada Muziadi dan peluang untuk didengar menurut s 16(4) AKT. Mahkamah memutuskan bahawa perayu tidak boleh bergantung pada peraturan 25(2) untuk memecat terus Muziadi kerana peruntukan itu tidak sah disebebakan tidak konsisten dengan undang-undang statut utama, iaitu, AKT. Peraturan 25(2)(a) membenarkan Majlis untuk memecat atau menurunkan pangkat seorang pekerja tanpa memberikan apa-apa notis tunjuk sebab atau peluang untuk didengar jika alasan pemecatan atau penurunan pangkat adalah atas sebab pertuduhan jenayah yang telah dibuktikan terhadap pekerja. Begitu juga, peraturan 50(4) membenarkan perkhidmatan pegawai ditamatkan 'demi kepentingan awam' tanpa memberikannya peluang untuk didengar. Mahkamah Rayuan ('MR') menolak rayuan perayu dan mengesahkan keputusan Mahkamah Tinggi. MR memutuskan, antara lain, bahawa kerana perkara itu melibatkan pekerjaan

A Muziadi, dan oleh itu mengenai mata pencariannya, dia sepatutnya diberi notis tunjuk sebab dan hak untuk didengar menurut kedua-dua s 16(4) AKT dan peraturan 29(1) Peraturan tersebut. Perayu telah diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR, antara lain, mengenai persoalan sama ada peraturan 25(2) tidak sah kerana adalah ultra
B vires s 16(4) AKT.

Diputuskan, menolak rayuan dan mengesahkan keputusan mahkamah bawahan:

C (1) Peraturan 25(2) Peraturan tersebut adalah tidak sah kerana adalah ultra vires s 16(4) AKT. Hujah bahawa Muziadi tidak seharusnya diberikan hak untuk didengar berdasarkan sabitan jenayahnya tidak dapat dikekalkan (lihat perenggan 85).

D (2) Kuasa membuat peraturan am Majlis tersebut di bawah s 17(1) AKT tidak meluaskan skop kuasa itu untuk membatalkan atau mengubah kesan hak asasi yang terkandung dalam proviso kedua kepada s 16(4) AKT. Hak asasi hanya boleh diabaikan jika kata-kata jelas dan nyata perundangan membenarkan pembatalan sedemikian. Kecuali terdapat kuasa yang jelas dalam Akta ibu untuk undang-undang subsidiari
E mengatasi peruntukan undang-undang yang terkandung dalam proviso kedua s 16(4), peraturan 25(2) Peraturan tersebut adalah tidak sah. Proviso kedua tersebut adalah jelas dan wajib, tidak bersyarat dan tidak berkelayakan. Kata-kata yang jelas diperlukan sebelum bahagian itu boleh ditafsirkan tertakluk kepada kuasa membuat peraturan umum
F Majlis tersebut di bawah s 17(1) AKT. Tiada perkataan yang jelas dalam s 16(4) (lihat perenggan 73–74).

(3) Proviso kedua kepada s 16(4) AKT menggunakan prinsip undang-undang keadilan asasi, yaitu, maksim audi alteram partem. Perundangan subsidiari atau yang diwakilkan (peraturan 25) tidak boleh,
G atau tidak sepatutnya, melanggar Akta ibu (yang mengkodkan prinsip undang-undang umum) kecuali dalam keadaan yang luar biasa di mana statut yang memberi kuasa memberikan kuasa itu secara nyata. Walau bagaimanapun, ia mungkin terbuka untuk dicabar, memandangkan kes
H ini mengenai hak untuk didengar berhubung dengan pekerjaan, yang berkaitan dengan hak unyuk mata pencarian (lihat perenggan 61).

(4) Kuasa subsidiari untuk membuat peraturan 'untuk tujuan mengekalkan tingkah laku dan disiplin yang baik di kalangan pegawai dan pekerja' tidak boleh dilaksanakan sedemikian untuk mewujudkan
I ketidakupayaan yang tidak dijangkakan oleh peruntukan Akta ibu atau untuk menafikan hak undang-undang umum yang telah dikodkan dalam Akta ibu sendiri. Melainkan Akta ibu mengandungi kata-kata yang jelas sebaliknya, ia harus diandaikan bahawa Akta itu tidak mengubah prinsip undang-undang umum yang dikodkan. Di mana

suatu undang-undang mempunyai dua tafsiran, satu yang melibatkan pengubahan undang-undang umum dan yang satu lagi tidak, tafsiran yang satu lagi itu menjadi pilihan. Ia juga merupakan tafsiran prinsip statutori yang jelas bahawa Parlimen dianggap tidak berhasrat untuk mengehadkan hak-hak asasi melainkan ia menunjukkan niat sedemikian dengan terma yang jelas (lihat perenggan 75 & 84).

(5) Walaupun doktrin pembinaan harmoni diterapkan pada matriks sebenar rayuan ini, ia tidak mustahil untuk menyelaraskan perbezaan dalam peruntukan-peruntukan yang bercanggah dan untuk memberi kesan kepada kedua-duanya. Terdapat konflik atau ketidakselarasan antara s 16(4) AKT dan peraturan 25(2) Peraturan tersebut. Perundangan subsidiari atau yang diwakilkan mesti diberi keutamaan kepada Akta ibu dan beroperasi dalam konteks Akta ibu dan tidak patut lebih luas daripada undang-undang yang membolehkannya. Prinsip tafsiran statutori umum ini dikodifikasikan dalam s 23 Akta Tafsiran 1948 dan 1967 (lihat perenggan 80–82).

(6) Muziadi telah dinafikan keadilan prosedur yang dimandatkan oleh perkara-perkara 5(1) dan 8(1) Perlembagaan Persekutuan. Penamatan pertama kali dilakukan mengikut peraturan 50; selepas itu perayu pertama mengubah fikirannya dan memecat Muziadi menurut peraturan 39(g). Muziadi tidak diberitahu mengenai sebab perubahan yang disebutkan di atas atau diberikan peluang untuk mempertahankan dirinya sebelum keputusan diambil untuk memberhentikannya. Tindakan mengubah keputusan awal untuk melakukan pemecatan demi kepentingan awam, yang dengan sendirinya melanggar rukun audi alteram partem, telah diburukkan lagi oleh keputusan berikutnya untuk memecatnya. Ia berpunca daripada pelanggaran yang kedua dan lebih serius terhadap peraturan tersebut kerana Muziadi telah kehilangan hak pencennya, dan sebagainya. Perayu telah bertindak secara tidak sah dan melanggar peraturan keadilan semulajadi, bukan sekali, tetapi dua kali (lihat perenggan 89, 91 & 93).

(7) Di bawah kuasa-kuasa tambahan yang diberikan kepada Mahkamah Tinggi dalam perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964, mahkamah, selain mengeluarkan certiorari, mempunyai kuasa untuk membuat perintah berbangkit bagi maksud mentaksiri pampasan/ganti rugi yang adil kepada pekerja yang dipecat. Dalam kes ini, Mahkamah Tinggi adalah betul dalam memerintahkan ganti rugi yang akan ditaksir oleh pendaftar dan ganti rugi tersebut patut ditaksir atas dasar bahawa Muziadi kekal dalam kedudukannya, kerana dia tidak pernah dipecat. Akibat keputusan mahkamah dalam memberikan certiorari adalah kedudukannya dikekalkan (lihat perenggan 106–107 & 109–110).]

Cases referred to

Anisminic Ltd v Foreign Compensation Commission and another [1967] 3 WLR 382, CA (refd)

Attorney-General v HRH Prince Ernest Augustus of Hanover [1957] 1 All ER 49, HL (refd)

Coco v R (1994) 120 ALR 415; [1994] 179 CLR 427, HC (refd)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141; [1982] 1 WLR 1155, HL (refd)

Commissioner of Income Tax v Hindustan Bulk Carriers [2002] 3 SCC 57, SC (refd)

Doody v Secretary of State for the Home Department; and other appeals [1993] 3 All ER 92; [1994] 1 AC 531, HL (refd)

F Hoffmann-La Roche & Co AG and others v Secretary of State for Trade and Industry [1974] 2 All ER 1128, HL (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)

Lloyd and others v McMahon [1987] 1 All ER 1118; [1987] AC 625, CA (refd)

Local Government Board v Arlidge [1914–15] All ER Rep 1; [1915] AC 120, HL (refd)

MBf Holdings Bhd & Anor v Houng Hai Kong & Ors [1993] 2 MLJ 516, HC (refd)

Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor [2018] 3 MLJ 784; [2018] 3 CLJ 715, CA (refd)

Muziadi bin Mukhtar v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor [2017] MLJU 583; [2017] 1 LNS 587, HC (refd)

O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124; [1983] 2 AC 237, HL (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2019] 2 MLJ 49; [2019] 4 CLJ 466, CA (refd)

Potter v Minahan [1908] 7 CLR 277, HC (refd)

R v Army Board of Defence Council, ex parte Anderson [1991] 3 All ER 375; [1992] QB 169, QBD (refd)

R v Secretary of State for The Home Department; Ex parte Simms [2000] 2 AC 115, HL (refd)

R v Secretary of State for the Home Department, Ex parte Leech [1994] QB 198, CA (refd)

Ramachandram s/o Appalanaidu & Ors v Dato Bandar Kuala Lumpur & Anor [2012] 6 MLJ 519; [2012] 1 LNS 625, CA (refd)

Regina v Secretary of State for the Home Department, Ex parte Pierson [1998] AC 539, HL (refd)

Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352, SC (refd)

Sultana Begum v Prem Chand Jain AIR [1997] SC 1006, SC (refd)
Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
White v Ryde Municipal Council [1977] 2 NSWLR 909, CA (refd)
Wiseman and Another v Borneman and Others [1969] 3 All ER 275; [1971] AC 297, HL (refd)

Legislation referred to

Civil Law Act 1956 ss 3, 5
Courts of Judicature Act 1964 Schedule, para I
Federal Constitution arts 5(1), 8(1), 132
Interpretation Acts 1948 and 1967 s 23
Local Government Act 1976 ss 16(4), 17, 17(1), Part III
Minor Offences Act 1955 s 28(1)A
Prison Act 1952 [UK] s 47
Prison Rules 1964 [UK] r 33(3)
Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995 regs 25(1)(a), 25(2), 26, 29(1), 34, 38, 39, 39(g), 50, 50(4)
Rules of the Court 2012 O 53

Appeal from: Civil Appeal No P-02(A)-1017–05 of 2017 (Court of Appeal, Putrajaya)

Cyrus Das (Karin Lim and M Mugan with him) (Presgrave & Matthews) for the appellant.
Selvarani Naramasivoo (Selvarani Naramasivoo & Co) for the respondent.

Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal dated 5 December 2018, affirming the decision of the Penang High Court dated 25 April 2017 which allowed the respondent's application for judicial review to quash the decision of the first appellant. The High Court held that the failure by the appellants to give the respondent a reasonable opportunity of being heard as required by s 16(4) of the Local Government Act 1976 ('the LGA') and reg 29(1) of the Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995 ('the 1995 Regulations') rendered the first appellant's decision to dismiss the respondent from his employment unsustainable in law.

[2] The appeal was by leave granted by this court on 6 August 2018. The questions of law reserved for our determination are as follows:

(1) whether sub-reg 25(2) of the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 which provides that sub-reg (1) shall not apply in the following cases:

(a) where an officer is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

(b) where the disciplinary authority is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of this regulation; or

(c) where the Yang di-Pertuan Agong is satisfied that in the interest of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this regulation; or

(d) where there has been made against the officer any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such officer any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls, is ultra vires s 16(4) of the Local Government Act 1976 and is as a consequence void;

(2) whether sub-reg 25(2) of the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 is consistent and intra vires s 16(4) of the Local Government Act 1976 read with s 17(1) of the Local Government Act 1976;

(3) whether an officer or employee of the local authority can elect not to be reinstated to his original post with the local authority but to be given damages in lieu of reinstatement to employment; and

(4) whether damages as a consequential relief that is damages suffered by the officer or an employee can be ordered to be assessed by the court contrary to the principle of 'no pay for no work'.

THE PARTIES

[3] The first appellant is a disciplinary authority established under reg 26 of the 1995 Regulations.

[4] The second appellant is a local authority established under the LGA by

the State Authority of Penang and is responsible for the conduct and discipline of all its servants.

[5] The respondent was at all material times the servant and/or employee of the second appellant. It is common ground that he is not a public servant as defined in art 132 of the Federal Constitution ('the FC'). The employment of the respondent is solely governed by the provisions of the LGA and the 1995 Regulations.

THE FACTUAL BACKGROUND AND ANTECEDENT PROCEEDINGS

[6] The factual background and antecedent proceedings of the case are helpfully and succinctly set out by the High Court and the Court of Appeal (see *Muziadi bin Mukhtar v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* [2017] MLJU 583; [2017] 1 LNS 587 (HC); *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2019] 2 MLJ 49; [2019] 4 CLJ 466 (CA)). The following is a brief summary of the factual background and antecedent proceedings taken from those judgments with some modifications.

[7] The respondent was employed as a security guard (Grade KP11) on 2 January 2008 and was promoted to a senior security guard (Grade KP14) on 1 October 2011.

[8] On 6 May 2010, the respondent was charged in the Magistrate's Court at Bukit Mertajam for an offence of unlawful possession of property under the Minor Offences Act 1955 (Act 336). He pleaded guilty to the charge and was fined RM600. The respondent paid the fine.

[9] According to the respondent, he had informed his superior, one Hazani bin Omar, of his plea of guilt and payment of the fine of RM600 on the afternoon of 6 May 2010 itself, and that no action was taken against him by the second appellant in connection with the case.

[10] The appellants disputed the above fact and asserted that the respondent did not notify the second appellant of his plea of guilt and his conviction by the Bukit Mertajam Magistrate's Court of 6 May 2010.

[11] Four years later in August 2014, the Yang di-Pertua of the second appellant received an anonymous letter pertaining to the respondent's involvement in the crime resulting in his conviction by the Bukit Mertajam Magistrate's Court.

A **[12]** Accordingly, an investigation was conducted by the Head of Management Services Department of the second appellant. The second appellant wrote letters dated 18 September 2014 and 24 October 2014 to the Bukit Mertajam Magistrate's Court to obtain confirmation of the alleged criminal involvement of the respondent.

B

[13] The Bukit Mertajam Magistrate's Court replied to the second appellant in the affirmative by a letter dated 30 October 2014 and enclosed the relevant documents.

C

[14] As a result, the second appellant set up an Internal Investigation Committee ('IIC') to inquire into the allegations in the aforesaid anonymous letter.

D **[15]** The IIC conducted its inquiry on 10 October 2014, 15 October 2014, including holding a hearing on 17 October 2014 wherein the respondent was heard and his explanation or version of events obtained. The respondent admitted to having committed the offence as charged in the Bukit Mertajam Magistrate's Court.

E

[16] The IIC thereafter forwarded its report by a memo dated 20 November 2014 to the Yang di-Pertua of the second appellant. The second appellant then sent a report pursuant to reg 34 of the 1995 Regulations by a memo dated 6 December 2014 to the first appellant.

F

[17] On 17 February 2015, the second appellant submitted a paper to the first appellant to consider the appropriate punishment to be imposed on the respondent. The first appellant adjourned its consideration and requested the second appellant to submit a performance appraisal report on the respondent. The performance appraisal report was subsequently submitted by a memo dated 9 March 2015.

G

[18] On 25 March 2015, the secretariat of the first appellant prepared and submitted a paper to the first appellant to determine the appropriate punishment to be imposed on the respondent in accordance with reg 38 of the 1995 Regulations.

H

[19] Again, the first appellant on 1 April 2015 adjourned its consideration to invite the Head of Department of the respondent to furnish further information on his work performance.

I

[20] Then, the Head of Department of the respondent met the respondent on 6 April 2015.

[21] On 24 April 2015, the second appellant submitted another paper to the first appellant to consider the appropriate punishment to be imposed on the respondent pursuant to regs 34, 38 and 39 of the 1995 Regulations.

[22] At the meeting on 29 April 2015, the first appellant resolved to terminate the employment of the respondent in the public interest pursuant to reg 50 of the 1995 Regulations and requested the secretariat of the first appellant to prepare a working paper.

[23] Meanwhile, on 12 May 2015, the Assistant Director of Services and Employment of the second appellant met the respondent.

[24] The working paper was prepared and subsequently submitted to the first appellant on 21 May 2015.

[25] At the meeting on 25 May 2015, the first appellant decided to terminate the employment of the respondent in the public interest with effect from 2 October 2015 pursuant to reg 50 of the 1995 Regulations.

[26] Consequently, the first appellant sent a letter dated 19 June 2015 to the respondent to terminate his employment in accordance with reg 50 of the 1995 Regulations and the respondent was required to submit certain documents for purposes of calculating his pension and other retirement benefits.

[27] The respondent, however, by letter dated 26 June 2015, replied to the first appellant rejecting the decision of the first appellant to terminate his employment in the public interest. In addition, the respondent through his solicitors Messrs Selvarani Naramasivoo & Co sent a letter dated 19 August 2015 to the second appellant notifying the respondent's dissatisfaction with the decision.

[28] The secretariat of the first appellant then on 3 September 2015 submitted a paper to the first appellant suggesting that the decision of the first appellant to terminate the employment of the respondent in public interest be revoked. On 3 September 2015, the secretariat of the first appellant also prepared another working paper on the appropriate punishment to be imposed on the respondent.

[29] At the meeting on 4 September 2015, the first appellant decided to revoke the termination of the employment of the respondent in public interest. Instead of a termination, the first appellant decided to take disciplinary action against the respondent by dismissing his employment in accordance with reg 39 of the 1995 Regulations.

[30] The second appellant by a letter dated 4 September 2015 notified the respondent that the termination of his employment in the public interest was revoked with immediate effect.

[31] The first appellant by a letter dated 4 September 2015 informed the respondent that the conduct of the respondent had tarnished the name of the public services and that he was dismissed from his employment in accordance with reg 39(g) of the 1995 Regulations. The letter reads:

> 2. Sehubungan itu Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai di dalam mesyuaratnya yang ke-8/2015 pada 04 September 2015 adalah menimbang dengan teliti fakta kes dan kesalahan yang dilakukan oleh tuan, memutuskan bahawa tuan dengan ini dikenakan hukuman berikut mengikut Peraturan 39, Peraturan-Peraturan Pegawai Awam Majlis Perbandaran Seberang Perai (Kelakuan & Tatatertib) 1995.
>
> 39(g) Buang Kerja
>
> 3. Hukuman adalah berkuatkasa mulai tarikh penerimaan surat ini. Sila tuan akui penerimaan surat ini dengan menandatangani Surat Akuan Terima yang disertakan dan dikembalikan.

[32] Thus, instead of termination of service in the public interest with full pension and retirement benefits, which the respondent rejected and which the first appellant revoked, the respondent was now dismissed with no such benefits.

[33] Dissatisfied with the decision, the respondent applied for judicial review to quash the decision.

DECISIONS OF THE COURTS BELOW

The High Court

[34] On 25 April 2017, the High Court allowed the respondent's application for judicial review and granted the following orders:

(a) an order of certiorari to quash the decision of the appellants vide letter dated 4 September 2015;

(b) damages suffered by the respondent to be assessed by the registrar; and

(c) cost of RM15,000 to be collectively paid by the appellants to the respondent.

[35] In arriving at this decision, the High Court held that there was procedural impropriety on the part of the first appellant by not affording to the respondent his right to be heard by way of issuing a show cause notice as

mandated by s 16(4) of the LGA. Therefore, natural justice was denied to the respondent. The court further held that reg 25(2) of the 1995 Regulations that was made under s 17 of the LGA was void as being inconsistent with its parent statute.

[36] Dissatisfied with the decision of the High Court, the appellants appealed to the Court of Appeal.

The Court of Appeal

[37] The Court of Appeal dismissed the appellants' appeal. It is unnecessary to repeat the Court of Appeal's detailed reasoning.

[38] In a nutshell, the Court of Appeal rejected the appellants' argument that it was not a legal requirement for the respondent to be given a right of hearing pursuant to reg 25(1)(a) of the 1995 Regulations. The Court of Appeal also rejected the appellants' argument that s 16(4) of the LGA must be read subject to s 17(1) of the LGA. The court opined that s 16(4) does not say that it is subject to s 17(1). In the absence of such qualification, there was no basis to suggest that s 16(4) is subject to s 17(1).

[39] Finally, the court considered s 16(4) of the LGA and both regs 25(2) and 29(1) of the 1995 Regulations. The court opined:

> [42] In our view, in a situation of statutory conflict as in the present case, a construction that favours the employee must be given, more so where the employee's livelihood is at stake. In the context of the present appeal, the respondent must be given the benefit of s 16(4) of the LGA and reg 29(1) of the 1995 Regulations which accord him a right of hearing, rather than to subject him to the provisions of reg 25(2)(a) which denies him of that right.
>
> [43] It is important to bear in mind that both regs 25(2)(a) and 29(1) of the 1995 Regulations were made under the same section of the LGA, ie s 17(1). It was therefore untenable for the appellants to argue that reg 25(2)(a) must take precedence over reg 29(1) on the ground that it was made for the purpose of maintaining good conduct and discipline among officers and employees of the second appellant.

[40] The court concluded at para 48:

> [48] In the circumstances, we endorse the learned judge's view that it was mandatory for the appellants to serve a show cause notice on the respondent and affording him a reasonable opportunity of being heard as required by reg 29(1) of the 1995 Regulations. Their failure to do so rendered the decision to dismiss the respondent unsustainable in law.

A OUR DECISION

Leave questions (I) and (II)

Parties' competing submissions

B The appellants' submission

[41] The appellants' appeal is mounted on two main planks. Firstly, learned counsel for the appellants argued that s 16(4) of the LGA has been complied with in this case both on the facts and the law. Learned counsel posited that the C respondent was given an opportunity to make his representation to the IIC and later to his Head of Department on 6 April 2015 and to the Assistant Director of Service and Employment on 12 May 2015.

[42] Learned counsel further submitted that s 16(4) of the LGA does not D provide for the stage at which the hearing is to be accorded to the employee in the disciplinary process and the right to be heard could be delegated to any inquiring committee in the disciplinary process. In advancing his arguments, learned counsel relied on, among others, such cases as *Local Government Board v Arlidge* [1914–15] All ER Rep 1; [1915] AC 120; *White v Ryde Municipal* E *Council* [1977] 2 NSWLR 909. The main principle that can be distilled from these cases is the general right to be heard need not be before the administrative decision-maker, a hearing before the inquiry committee may be perfectly fair for legal purposes.

F **[43]** Learned counsel emphasised that natural justice is a matter of substance and not form: which means that the administrative decision-maker had acted fairly towards the person who would be adversely affected by the decision (see *De Smith's Judicial Review* (8th Ed, 2018); *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124; [1983] 2 AC 237, *Lloyd and others v* G *McMahon* [1987] 1 All ER 1118; [1987] AC 625).

[44] On the principles set out above, learned counsel submitted that the requirement of 'reasonable opportunity to be heard' has been met in this case.

H

[45] Secondly, learned counsel argued that the Court of Appeal had erred in ruling that reg 25(2) of the 1995 Regulations is ultra vires s 16(4) and invalid. In strenuously advancing his arguments on behalf of the appellants in support of the contention that reg 25(2) of the 1995 Regulations is valid and intra vires I the LGA, learned counsel made detailed submissions, the main planks of which will now be outlined:

(a) reg 25(2) of the 1995 Regulations would not be construed as ultra vires s 16(4) of the LGA if read harmoniously with s 17(1) of the LGA (see *Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All

ER 49 at p 55; GP Singh, *Principles of Statutory Interpretation* (LexisNexis, 14th Ed, 2016)); A

(b) the presumption of validity of a statutory provision applies equally to subsidiary legislation and that if two interpretations are possible, the interpretation that saves the legislation is to be preferred (see *F Hoffmann-La Roche & Co AG and others v Secretary of State for Trade and Industry* [1974] 2 All ER 1128; GP Singh, *Principles of Statutory Interpretation* at p 1078); B

(c) s 17(1) of the LGA confers a broad rule making power to the second appellant to make rules for the purpose of 'maintaining good conduct and discipline' among its officers and servants. The section does not say that no rule could be made that permits a dismissal or termination of employees without a reasonable opportunity of being heard; and C

(d) on a harmonious reading of ss 16(4) and 17(1) of the LGA, the following features may be noted: D

(i) both ss 16(4) and 17(1) of the LGA deal with the same subject matter of staff discipline under Part III of the LGA under the heading 'Officers and Employees of Local Authorities'; E

(ii) one subsection immediately follows the other;

(iii) a restriction in the form of a proviso found in the earlier subsection is conspicuously omitted in the latter; and

(iv) this is a deliberate omission by Parliament. F

The respondent's submission

[46] In reply, learned counsel for the respondent supported the decision of the courts below. She submitted that the appellants had failed to accord a reasonable opportunity of being heard to the respondent in accordance with s 16(4) of the LGA and reg 29(1) of the 1995 Regulations. G

[47] Learned counsel contended that it is vital for the respondent to be given reasonable opportunity to explain his side of the story to the appellants, particularly the first appellant. Although the respondent had pleaded guilty in the Bukit Mertajam Magistrate's Court, there is no evidence adduced by the appellants to show that the first appellant was apprised of the full facts of the case in the magistrate's court. The documents furnished by the Bukit Mertajam Magistrate's Court merely confirmed the fact that the respondent had pleaded guilty under s 28(1)A of Act 336 and that he was fined in the sum of RM600. No other particulars of the case were furnished to the appellants. Learned counsel posited that if the appellants had given the respondent a right to explain the facts of the case and why he pleaded guilty to the charge, it might H I

A have resulted in a lesser punishment or even a complete exoneration rather than dismissing him from his employment. Learned counsel emphasised the fact that the offence committed by the respondent is unconnected with his official capacity in the course of employment with the second appellant but rather with the Fishermen Association.

B

[48] Learned counsel submitted that the courts below are correct in holding that reg 25(2) of the 1995 Regulations is inconsistent and ultra vires s 16(4) of the LGA. Section 16(4) of the LGA provides that a reasonable opportunity of being heard must be given to respondent before dismissing him from his
C employment, whereas reg 25(2) of the 1995 Regulations does not provide the same requirement if a criminal charge has been proved against the employee.

[49] In support of her submission, learned counsel relied on s 23 of the
D Interpretation Acts 1948 and 1967 which provides that any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

Relevant statutory provisions

E

[50] We begin our analysis in this appeal by setting out the key statutory provisions relevant to the issues.

[51] Section 16(4) of the LGA provides as follows:

F

List of Offices

(4) The Commissioner of the City of Kuala Lumpur in the case of the Federal Territory, or the Mayor or President or his representative who shall be a Councillor, the Secretary and one other Councillor in the case of other local authorities, may
G appoint such persons to the offices shown on the list so approved and may reduce in rank or dismiss such persons from office and may appoint others in their stead:

Provided that the reduction in rank or dismissal from office of any Head of Department or his Deputy shall not take effect until such reduction in rank or dismissal has been confirmed by the State Authority:

H *Provided further that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard.* (Emphasis added.)

[52] Section 17(1) of the LGA reads as follows:

I 17 Power of local authority to provide for discipline, etc, of its officers

(1) A local authority may, with the approval of the State Authority, *from time to time make rules for the purpose of maintaining good conduct and discipline among officers and employees* and may impose any punishment upon any such officer or employee who is guilty of misconduct or breach of duty in the exercise of his official functions:

Provided that no punishment shall be imposed on any Head of Department or his Deputy without the prior approval of the State Authority. (Emphasis added.)

[53] Regulation 25 of the 1995 Regulations is in the following terms:

Conditions for dismissal or reduction in rank 25.

(1) Subject to the provision of subregulation (2), no officer shall be dismissed or reduced in rank in any disciplinary proceedings under this Part unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard.

(2) Subregulation (1) shall not apply in the following cases:

(a) *where an officer is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or*

(b) where the Disciplinary Authority is satisfied that for some reason, to be recorded by it in writing, it is no reasonably practicable to carry out the requirements of this regulation; or

(c) where the Yang di-Pertuan Agong is satisfied that in the interest of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this regulation; or

(d) where there has been made against the officer any order of detention, supervision restricted residence, banishment or deportation, or where there has been imposed on such officer any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls. (Emphasis Added).

[54] Subregulation 29(1) of the 1995 Regulations provides:

Procedure in disciplinary cases with a view to dismissal or reduction in rank 29(1) The Disciplinary authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank shall consider all the available information and where it appears that there is a prima facie case against the officer for dismissal or reduced in rank, *the Disciplinary Authority shall direct that statement containing the fact of the breach of discipline alleged to have been committed by the officer to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days the date of receipt of the charge*. (Emphasis added.)

[55] Subregulation 50(4) of the 1995 Regulations reads:

A Termination in the public interest (4) Notwithstanding anything in these Regulations and any other law to the contrary, in terminating the service of an officer in the public interest under these regulations, *such officer may not be given any opportunity of being heard* ... regardless of whether such termination of the service of the officer involved an element of punishment or was connected with conduct in
B relation to this office which the Council regards as unsatisfactory or blameworthy. (Emphasis added.)

Analysis and findings whether reg 25(2) of the Regulations 1995 is ultra vires/inconsistent with s 16(4) of the LGA

C Breach of fundamental rights

[56] It is clear beyond argument that the first proviso to s 16(4) of the LGA codifies one of the fundamental precepts of the natural justice, ie the legal maxim audi alteram partem. The principle simply provides that a person
D should be given the opportunity to be heard before the decision that adversely affects him or her is made (see *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141; [1982] 1 WLR 1155 (HL), *R v Army Board of Defence Council, ex parte Anderson* [1991] 3 All ER 375; [1992] QB 169 and *Doody v*
E *Secretary of State for the Home Department; and other appeals* [1993] 3 All ER 92; [1994] 1 AC 531 (HL)).

[57] The importance of the principle of audi alteram partem cannot be overemphasised; it affords an aggrieved person the opportunity to participate
F in the decision that will affect him or her by influencing the outcome of the decision. The participation of an aggrieved person in the process of decision-making constitutes a safeguard that not only signals respect for the dignity and worth of the participants but improves the quality and rationality of administrative decision-making and further enhances its legitimacy.

G

[58] The audi alteram partem principle is now well recognised and established in its application to the decisions of administrative authorities as well as judicial and quasi-judicial tribunals (see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152).

H

[59] The question before us is whether the rule making-power of the local authority (the second appellant) under s 17(1) of the LGA permits it to make regulations that dispense with the right of hearing where the employee was convicted for a criminal offence or the determination was in the public interest.

I

[60] On this issue, learned counsel for the appellants submitted that the second appellant is empowered under s 17(1) of the LGA to make regulations that provide for dismissal, termination or cessation of service of its employees without a right of hearing. The main argument advanced by learned counsel

was that only one of the two provisos contained in s 16(4) is carried over into s 17(1) although they deal with the same subject, namely, the discipline of employees. It was further contended that both provisos in s 16(4) function as a restraint on the power of dismissal. Consequently, in the absence of a restraint in the form of the second proviso, it is open to the second appellant to frame reg 25 of the 1995 Regulations.

[61] As we have alluded to earlier in this judgment, the second proviso to s 16(4) of the LGA incorporates one of the fundamental precepts of the common law principles of natural justice ie the legal maxim audi alteram partem. Subsidiary or delegated legislation (reg 25 of the 1995 Regulations) cannot or ought not to infringe the parent Act (which codifies common law principles), save in the exceptional circumstances where the empowering statute provides that power expressly. Even so, it might well be open to challenge, given that in the instant case we are dealing with the right to be heard in relation to employment, which relates to the right to livelihood.

[62] This approach to the construction of empowering statutes when common law rights, whether codified by statute or otherwise, in play was outlined by the House of Lords, inter alia, in *R v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198 ('Ex parte Leech') and *Regina v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 ('Ex parte Pierson').

[63] In *Ex parte Leech*, the issue for determination was whether r 33(3) of the Prison Rules 1964 that infringed a prisoner's common law rights to legal professional privileges and access to the courts were authorised by s 47 of the Prison Act 1952 (UK). The impugned prison rule provided the governor with unrestricted power to read and examine letters between prisoners and their legal advisers on the ground of prolixity and objectionability.

[64] In that case, Lord Justice Steyn reaffirmed the long-standing judicial 'presumption against statutory interference with vested common law rights' (at p 209). According to His Lordship, some rights had special constitutional significance and one such right was unimpeded access to the courts, which required a prisoner's access to legal consultation with solicitor. It followed that s 47(1) did not authorise the making of any rule which created an impediment to the free flow of communication between a solicitor and a client about contemplated legal proceedings. Lord Justice Steyn explained that a court should find statutory inference with such a basic right only where Parliament has used express language, while a necessary implication for interference should be a rarity.

[65] In *Ex parte Pierson*, Lord Browne-Wilkinson traced the relevant line of

A authorities and said they established the following proposition at p 575:

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of
B Parliament.

[66] In *Potter v Minahan* [1908] 7 CLR 277, O'Connor J of the Australia High Court had this to say at p 304:

C
> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

D

[67] Similar observations were made in *R v Secretary of State for The Home Department; Ex parte Simms* [2000] 2 AC 115 at p 131 ('Ex parte Simms') where it was held as follows:

> [T]he principle of legality means that Parliament must squarely confront what it is
E doing and accept the political cost. *Fundamental rights cannot be overridden by general or ambiguous words.* This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. *In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to*
F *be subject to the basic rights of the individual*. (Emphasis added.)

[68] It is also important to note that the reception or application of English common law in Malaysia is governed by ss 3 and 5 of the Civil Law Act 1956 (Revised 1972) ('the CLA'). Hence, the Malaysian legal system and its laws
G follow closely the English common law principles and also applies judgements and decisions by the English courts in deciding cases. Right to be heard is undoubtedly a valuable and cherished right possessed by a citizen and this right is enshrined in common law as discussed above. This right could only be taken away by clear and unambiguous words in a legislation.

H

[69] In the case of the *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509, the Federal Court through the judgement of Ariffin Zakaria CJ (Malaya) (as he was then) said at p 690 (MLJ);
I pp 527–531 (CLJ):

> The Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 endorsed the view of the learned judge in relation to native customary rights in that the common law respects the pre-existence of rights under native laws or customs though such rights may be

taken away by clear and unambiguous words in a legislation. By common law the Court Appeal must be referring to the English common law as applicable to Sarawak by virtue of s 3(1)(c) of the Civil Law Act 1956. In this regard it should be emphasised that the *common law is not a mere precedence for the purposes of making a judicial decision. It is a substantive law which has the same force and effect as written law. It comes within the ter of 'existing law' under art 162 of the Federal Constitution* … (Emphasis added.)

[70] A similar point also was observed in the case of *MBf Holdings Bhd & Anor v Houng Hai Kong & Ors* [1993] 2 MLJ 516. The court commented on the application of common law in Malaysia in the following terms:

Common law is not a mere precedence for the purposes of making a judicial decision. *Common law is a substantive law which has the same force and effect as written law*. It has been accepted in this country and is recognised as a binding authority. It is therefore not true to say that under art 162 common law no longer exists. *I am of the view that under art 162 common law comes within the meaning of 'existing law'* and therefore until it is repealed by the authority it continues to be enforced after Merdeka Day.

...

I am of the view that under common law the court has the power to restrain anyone from publishing, unless with just cause, something which is or which is likely to cause damage or injury to other people.

...

It would be misleading to say that common law overrides statute Law. Rather, common law is to be regarded as complementary to the written law. It exists side by side with the written law where no law has been enacted by Parliament.

I am sure that Parliament is aware that common law exists before Merdeka. It would be a very simple matter for the Parliament to remove common law from the judicial system if Parliament so desires. The fact that Parliament, in its wisdom, never thought it necessary to take any positive step to remove common law from our legal concept lends support to my view that common law continues to exist after Merdeka.

It is to be noted that the Courts of Judicature Act 1964, which is a law made by Parliament after Merdeka, did not remove the jurisdiction and powers of the court to apply common law in this country. It seems certain to me that Parliament did not consider it wise to abandon the principle of common law altogether from our legal system. Consequently, common law remains in force and continues to form part of the law of Malaysia. (Emphasis added.)

[71] When a fundamental right is breached by subsidiary legislation as in this instant appeal, the more pressing question to be addressed is whether such limitation or breach is justifiable. To quote what Etienne Mureineik wrote in an article Fundamental Rights and Delegated Legislation, *South African Journal of Human Rights* Vol 1, No 2 (August 1985) at pp 111–112, he said:

A But where the inferior law destroys a fundamental right, the evidence of legislative intent supplied by the language of empowering provision cannot be decisive. Against it must be put a concern for the preservation of fundamental rights that, mostly for constitutional reasons (to the nature which I shall return later), must be imputed to the legislature. *That concern is a reason why the legislature must be taken not to have intended the destruction of fundamental rights. And since the language of the empowering provision is general, and cannot therefore be taken as evidence that the legislature contemplated the destruction of any particular fundamental right, it affords no evidence that the legislature did intend to sanction the destruction of a fundamental right.* So the language must yield, as evidence of legislative intent, to the evidence supplied by the concern for fundamental rights imputed to the legislature. In a contest with a general power, that concern must always prevail. *It follows that legislative consent to the destruction of a fundamental right cannot be inferred from a general power: it can be inferred only from an empowering provision that envisages the destruction of that right. In other words, an inferior law that destroys a fundamental right is intra vires its empowering statute only if that statute, whether expressly or impliedly, specifically envisages the destruction of that fundamental right by an inferior law and, although this almost inevitably follows, acquiesces in that destruction. We might call this version of the doctrine that protects fundamental rights the rule requiring specific authority.* (Emphasis added.)

E **[72]** In the light of the above discussion, it is established that the fundamental rights may only be disregarded if clear and express words of the legislature permits such abrogation. This view is fortified in numerous local and other commonwealth countries authorities, to name but a few:

F (a) *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152:

> *... The cases show that a fair hearing is required as a 'rule of universal application', 'founded on the plainest principles of justice'. In particular, the silence of the statute affords no argument for excluding the rule, for the 'justice of the common law will supply the omission of the legislature'.* These quotations are derived from the case of *Cooper v Wandsworth Board of Works*, which has several times recently been approved by the House of Lords as expressing the principle in its full width: see *Ridge v Baldwin*; *Wiseman v Borneman* [1971] AC 297.
>
> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, *no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing.* (Emphasis added.)

I (b) *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352:

> Most importantly, in considering the question whether there is a right to a hearing, *the crucial question is whether a statutory or other requirement provides or is to be interpreted as providing the elementary safeguard of the right to a hearing* (see, eg, *Stevenson v United Road Transport Union* [1977] 2 All ER

941 (CA); *Yates v Lancashire County Council* (1974) 10 ITR 20 (police); *Breen v Amalgamated Engineering Union & Ors* [1971] 2 QB 175 (trade union office holder) and *Social Club and Institute Ltd v Bickerton* (1977) ICR 911). (Emphasis added.)

(c) *Anisminic Ltd v Foreign Compensation Commission and another* [1967] 3 WLR 382 (CA):

> The determination must be preceded by inquiry. The nature of the inquiry, any conditions precedent to the inquiry, and the procedure to be adopted in the inquiry, may be laid down expressly in the statute. *In the absence of express provision to the contrary, the presumed intention of Parliament is that the inquiry shall be conducted in accordance with the rules of natural justice.* A convenient summary of the relevant rules is to be found in the speech of Lord Loreburn LC in *Board of Education v Rice*. (Emphasis added.)

(d) *Wiseman and Another v Borneman and Others* [1969] 3 All ER 275; [1971] AC 297:

> It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, *if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly*. (Emphasis added.)

[73] It is beyond argument that the general rule making-power of the second appellant under s 17(1) of the LGA does not extend the scope of that power so as to abrogate or alter the effect of the fundamental rights contained in the second proviso to s 16(4). Unless there is a clear authority in the parent Act for subsidiary legislation to override the statutory provision contained in the second proviso to s 16(4), reg 25(2) of the 1995 Regulations would be invalid.

[74] The second proviso to s 16(4) is explicit and mandatory. The section is unconditional and unqualified. In our opinion, clear words are required before the section could be construed to be subject to the general rule making-power of the second appellant under s 17(1) of the LGA. There are no such clear words in s 16(4).

[75] In our view, a subsidiary power to make regulations 'for the purpose of maintaining good conduct and discipline among officers and employees' cannot be so exercised as to bring into existence disabilities not contemplated by the provisions of the parent Act or to deny the common law rights which have been codified in the parent Act itself. At the risk of repetition, we say that unless the parent Act contains express words to the contrary, it must be

A assumed that the Act does not alter the codified common law principles. Further, it is trite that where a statute is capable of two interpretations, one involving alteration of the common law and the other not, the latter interpretation is to be preferred.

B Doctrine of harmonious construction

[76] Learned counsel for the appellants submitted that reg 25(2) of the 1995 Regulations 1995 would not be construed as ultra vires if s 16(4) of the LGA is read harmoniously with s 17(1). According to learned counsel, the doctrine of C ultra vires has two basic rules: (a) the statute must be read as a whole; and (b) the presumption of validity of a statutory provision (including subsidiary legislation). If two interpretations are possible, the interpretation that saves the legislation is to be preferred.

D

[77] Learned counsel further submitted that full effect must be given to the rule making-power stipulated under s 17(1) of the LGA which is unrestrained by the limits found in s 16(4) save as regards the first proviso. It follows, therefore, that reg 25(2) of 1995 was validly made under s 17(1).

E

[78] In this regard, it would be convenient for us to discuss the doctrine of harmonious constructions. To put it simply, the doctrine of harmonious construction means a statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so F as to make a consistent enactment of the whole statute. Such an interpretation is beneficial in avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. The five main principles of this doctrine/rule are as follows:

G (a) the court must avoid a head on clash of seemingly contradictory provisions and they must construe the contradictory provisions so to harmonise them (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57 at p 74);

H (b) the provision of one section cannot be used to defeat the provision contained in another unless the court, despite all its efforts, is unable to find a way to reconcile their differences;

(c) when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such a way I that effect is given to both provisions as much as possible (see *Sultana Begum v Prem Chand Jain* AIR [1997] SC 1006 at pp 1009–1010);

(d) courts must also keep in mind that interpretation that reduces one provision to useless or dead lumber is not harmonious construction (see

Commissioner of Income Tax v Hindustan Bulk Carriers [2002] 3 SCC 57 at p 74); and

(e) to harmonise is not to destroy any statutory provision or to render it fruitless.

[79] In a nutshell, the doctrine requires that the legislation be construed in a way which would achieve a harmonious result, and that construction should favour coherence in the law.

[80] Applying the foregoing principles to the factual matrix of this instant appeal, we are of the considered opinion that it is not possible to reconcile the differences in the contradictory provisions and to give effect to both of them. There is undoubtedly conflict or inconsistency between s 16(4) of the LGA and reg 25(2) of the 1995 Regulations. That is quite obvious. Whilst s 16(4) provides that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard, reg 25(2) provides the complete opposite if a criminal charge has been proved against the employee.

[81] It is trite that subsidiary or delegated legislation shall not be broader than the enabling legislation. This general principle of statutory interpretation is codified in s 23 of the Interpretation Act 1948 and 1967. In *Ramachandram s/o Appalanaidu & Ors v Dato Bandar Kuala Lumpur & Anor* [2012] 6 MLJ 519; [2012] 1 LNS 625, the Court of Appeal had this to say:

> [26] In Malaysia, that general principle of statutory interpretation is codified in s 23 of the Interpretation Act, which provides that 'Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency' (s 23 of the Interpretation Act). The effect of s 23 is as plain as a pikestaff. Subsidiary legislation that is inconsistent with the parent Act is void (see *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385; [2002] 2 CLJ 413, where the Supreme Court held, per Abdul Malek Ahmad FCJ, as he then was, that in the event of inconsistency or conflict between subsidiary legislation and the parent Act, the parent Act prevails by reason of s 23 of the Interpretation Act; *Hashim Hj Jasin v Pegawai Pengurus Pilihanraya Mohd Daud Abdul Hamid & Ors* [2008] 8 MLJ 402; [2008] 5 CLJ 387, where Zainal Adzam Abd Ghani J held that with the deletion of the provision under which the subsidiary legislation was made, the subsidiary legislation becomes ultra vires the Act).
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> [27] And any subsidiary legislation that is inconsistent with any Act is void (see *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6)* [1999] 1 MLJ 139; [1998] 3 CLJ Supp 390, where it held by RK Nathan JC, as he then was, that the rules of court could not override the express provisions of the Defamation Act; *Lim Pey Lin v Chia Foon Tau & anor* [2001] MLJU 626; [2002] 1 CLJ 42, where it was held by Low Hop Bing J, as he then was, that a rule of ethics must give way to the provisions of an Act; *Faridah Ariffin v Dr Lee Hock Bee & Anor* [2006] 1 CLJ 660, where it was

held by Abdul Malik Ishak J, as he then was, that 'any subsidiary legislation that runs counter to an Act of Parliament would be rendered void'; *Yap Hong Choon v Dr Pritam Singh* [2005] MLJU 533; [2006] 1 CLJ 842, where it was held by Tee Ah Sing J, as he then was, that O 34 r 4(2)(f) of the Rules of the High Court, being subsidiary legislation, cannot override the Evidence Act 1950 or the Courts of Judicature Act 1964; and *Ipmuda Bhd v Eurodec Development and Construction Sdn Bhd* [2009] 2 MLJ 464; [2009] 2 CLJ 711, where it was held by Rohana Yusuf J that since the conflict between r 87 of the Companies (Winding-Up) Rules 1972 and s 43(6) of the Bankruptcy Act was not a case of conflict between a specific law and a general law, therefore the maxim generalia specialibus non derogant did not apply, and that the said r 87, being subsidiary legislation could not override s 43(6) of the Bankruptcy Act). As for the apex court, in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753, it was held by the Federal Court per Zaki Azmi PCA, as he then was, that r 137 of the Federal Court, being subsidiary legislation, could not be read to override s 96(a) of the Courts of Judicature Act 1964. Clearly, therefore, no subsidiary legislation can be inconsistent with any Act. 'Unless the enabling Act so provides, delegated legislation cannot override any Act ...' (Bennion at p 244).

[82] Therefore, the subsidiary legislation must yield to the primacy of the parent Act and must operate in the context of the parent Act. As the stream cannot rise above its source, so the subsidiary/delegated legislation cannot be broader than the parent Act.

[83] We would like to emphasise that a statutory provision which delegates to the executive the power to make regulations should be strictly construed and that, where the power is conferred in general terms, it may be necessary to imply restrictions in its scope in order to avoid interference with the common law rights which have been codified in the parent Act itself.

[84] Further, a well-established principle of statutory interpretation is that Parliament is presumed not to have intended to limit fundamental rights, unless it indicates this intention in clear terms. In an Australian case of *Coco v R* (1994) 120 ALR 415; [1994] 179 CLR 427, the High Court restated this principle as follows:

> The courts *should not impute to the legislature an intention to interfere with fundamental rights.* Such an intention must be clearly manifested by unmistakable and unambiguous language. (Emphasis added.)

[85] Based on the above premise, with respect, we disagree with learned counsel for the appellants' submission that the officer should not be afforded the right to be heard merely by virtue of his criminal conviction. Consequently, we hold that reg 25(2) of the 1995 Regulations is ultra vires s 16(4) of the LGA and therefore void.

Procedural fairness

[86] In support of his submission concerning procedural fairness, learned counsel for the appellants relied on *De Smith's Judicial Review* (8th Ed, 2018) at pp 407–408 as follows:

> A flexible and evolving concept
>
> The content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject matter. *The requirements necessary to achieve fairness range from mere consultations at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully-fledged hearing* with most of the characteristics of a judicial trial at the other extreme. What is required in any particular case is incapable of definition in abstract terms. (Emphasis added.)

[87] In reply, learned counsel for the respondent argued that in all the circumstances of the case, the respondent had not been afforded with procedural fairness. Therefore, the respondent's dismissal was unlawful.

[88] Now, the concept of procedural fairness was deliberated, inter alia, in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665, where the Court of Appeal held at pp 532 and 536 (MLJ); pp 728–733 (CLJ):

> I have made these observations in order to emphasize the existence in the Federal Constitution of provisions, such as arts 5(1) and 8(1), which are of wide import and contain principles that are capable of meeting any issue of public law that arises for decision. The combined effect of these two articles is to require all state action to be fair and just; and they strike at arbitrariness even in the discharge of administrative functions. ...
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> ...
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> In my judgment, as a general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to *all* cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker.

[89] Applying the above principles to the case at hand, it is our considered view that the respondent had been denied the procedural fairness as mandated by arts 5(1) and 8(1) of the Federal Constitution. The record shows, and this fact was not disputed by both parties, that there was no notice to show cause from the appellants directing the respondent to state his case as required under reg 29(1) of the 1995 Regulations.

[90] In our view, prior notice to show cause is very important. In this regard, we refer to *De Smiths* at pp 412–413, where the learned author stated:

A The importance of prior notice

Procedural fairness generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position:-

B (a) to make representations on their own behalf,

(b) to appear at hearing or inquiry (if one to be held); and

(c) effectively to prepare their own case and to answer the case (if any) they have to meet.

C *Individuals should not be taken by surprise.* (Emphasis added.)

[91] In this instant appeal, it is very clear that the appellants had failed to comply with s 16(4) of the LGA by failing to give the respondent a reasonable opportunity of being heard before dismissing the respondent from his D employment. The material on record show that at first, termination was done in accordance with reg 50 of the 1995 Regulations. After that, the first appellant changed their mind to dismiss the respondent in accordance with reg 39(g) of the 1995 Regulations. The respondent was not informed of the reasons for the above-mentioned changes and was given no opportunity to E defend himself before the decision was taken to dismiss him. The respondent consulted his solicitors, Messrs Selvarani Naramasivoo & Co who wrote to the second appellant on 19 May 2015 to point out that the basic rules of natural justice had not been observed before the decision to dismiss the respondent from his employment was taken. In the said letter, the respondents' solicitors F stated:

Kami diarahkan oleh anak guam kami untuk mendapatkan penjelasan yang lengkap daripada pihak tuan mengenai sebab-sebab penamatan perkhidmatan anak guam kami mulai 2 Oktober 2015 tersebut dan juga kenapa anak guam kami tidak diberikan 'fair hearing' atau apa-apa 'surat tunjuk sebab' oleh pihak tuan sebelum G membuat keputusan tersebut.

[92] The second appellant did not respond to the respondent solicitors' letter. Subsequently, on 4 September 2015, the first appellant by a letter notified the respondent that the termination of his employment in public H interest was revoked with immediate effect and instead the respondent was dismissed from his employment in accordance with reg 39(g) of the 1995 Regulations.

[93] This act of converting the initial decision to terminate in the public I interest, which in itself breached the audi alteram partem rule was further exacerbated by the subsequent decision to dismiss the respondent. It amounted to a second and more serious breach of the said rule as by the decision, the respondent would be deprived of his right of pension etc. Those substantive rights were effectively removed or taken away from him, without affording him

an opportunity of being heard in his own defence. Therefore, shortly put, the appellants had acted unlawfully and against the rules of natural justice, not once, but twice.

[94] It must be noted that the 'proceedings' conducted by the first appellant were quasi-judicial in nature and therefore the first appellant had the mandatory duty to observe the dictate of natural justice.

[95] We refer to the case of *Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* [2018] 3 MLJ 784; [2018] 3 CLJ 715 where one of the issues raised related to the right to be heard. There, the disciplinary authority had proceeded to impose the punishment of dismissal on the applicant without giving the applicant the opportunity to explain and/or contradict the detrimental portion of the previous misconduct report.

[96] So too here. The respondent had not been given a chance to explain or state his case before the Disciplinary Authority decided to dismiss him under reg 39(g) of the Regulations 1995.

[97] In *Mohd Che Sobri bin Che Hassan*, the Court of Appeal held that there is a specific provision in the LGA which provides for the guarantee of a reasonable opportunity of being heard to be accorded to the applicant facing disciplinary proceedings with a view to reduction in rank and/or dismissed. The guarantee is further entrenched by way of legislation in the form of Regulations 1995 which provide the procedures to be complied with in the event the first respondent proposes to take disciplinary action against the applicant with a view to dismissal or reduction in rank.

[98] The Court of Appeal held that there was an infringement of natural justice when the disciplinary authority had disregarded the rights of the applicant by proceeding to impose the punishment of dismissal on the applicant without giving him opportunity to be heard.

[99] The submission advanced by learned counsel for the appellants that reg 25 of the 1995 Regulations is not inconsistent and repugnant to the provision of s 16(1) of the LGA cannot withstand judicial scrutiny and is liable to be rejected on the foregoing reasoning.

[100] Therefore, we would answer leave question No (1) in the affirmative and leave question No (2) in the negative.

Leave questions (III) and (IV)

Parties' competing submissions

The appellants' submission

[101] Learned counsel for the appellants submitted that the respondent is not deserving of any remedy because of his conduct and own wrongdoing. The respondent was criminally convicted and imposed with fine of RM600 and in default three months imprisonment.

[102] Learned counsel further submitted that the element of honesty and trustworthiness of a public servant is an important underlying assumption (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at p 273) and the court has a residual discretion to withhold remedy to a dismissal of an employee arising from the employee's conduct.

[103] In reply, learned counsel for the respondent submitted that in a judicial review proceedings, the court has the discretion under O 53 of the Rules of the Court 2012 to grant any relief and is not confined to the relief claimed by the appellant.

[104] Further, learned counsel for the respondent submitted that the court may mould the appropriate remedy to meet the facts and circumstances of the particular case.

[105] We do not think the issue of damages in lieu of 'reinstatement' is relevant in this instant appeal. It should be noted that in his application for judicial review dated 2 December 2015, the respondent sought an order of certiorari to quash the decision of dismissal and for a declaration that his dismissal was null and void, and that he was to maintain his status quo as senior security guard with all benefits. This is not equivalent to reinstatement.

[106] The effect of the court's decision in granting certiorari was that his position immediately prior to the lawful should be maintained. The critical question which immediately arises is whether the court may order damages to be paid to the appellant rather the placing him in his original position.

[107] The source of the power to mould judicial relief in an application for judicial review by the High Court is to be found in the Courts of Judicature Act 1964 ('the CJA 1964'). Under the heading of 'Additional Powers of High Court', para 1 of the Schedule of the CJA 1964 states:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[108] In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, the Court of Appeal had pointed out and emphasised that:

> [T]he power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
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> [T]he wide power conferred by the language of para 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.

[109] In the light of the above, it is clear that under the additional powers, besides issuing certiorari, the High Court also possess the power to make consequential orders for the purpose of assessing fair compensation/damages to the dismissed employee.

[110] In this instant appeal, the High Court was correct in ordering damages to be assessed by the registrar and these damages have to be assessed on the basis that the appellant remained in his position as he was never dismissed.

[111] Since the High Court never granted an order that the appellant be paid damages in lieu of reinstatement, the issue of damages in lieu of reinstatement did not arise in this instant appeal. Therefore, we decline to answer leave question No (3).

Doctrine of 'no-work-no-pay'

[112] In the light of the above reasoning, the doctrine of 'no-work- no-pay' did not come into play at all. Further, the appellants could not be heard to say that the respondent was not entitled to damages on a 'no-work-no-pay' basis when it was the appellants themselves who unlawfully dismissed the respondent from his employment in the first place.

[113] Therefore, we decline to answer leave question No (4). It is simply irrelevant in the context of the present appeal.

A CONCLUSION

[114] For all the reasons we have given, we would answer the leave questions as follows:

B No (1)

In the affirmative.

C No (2)

In the negative.

D No (3) and (4)

We decline to answer leave questions No (3) and (4).

E **[115]** In the result, the appellants' appeal is dismissed with costs. The decisions of the High Court and the Court of Appeal are hereby affirmed.

Appeal dismissed; decisions of courts below affirmed.

Reported by Ashok Kumar

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